Supreme Court, U.S.
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No. 92-414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEVEN P. LINDSEY,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

The corporate parent of Baxter Healthcare Corporation is Baxter International Inc.

The following are subsidiaries of Baxter Healthcare Corporation (except those that are wholly owned):

Baxter Diagnostics Inc.
Cirmex de Chihuahua S.A. de C.V.
Cirpro de Delicias, S.A. de C.V.
Homeline, Inc.
InterFlo Medical, Inc.
Laboratorios Baxter S.A.
Northwestern Memorial/Baxter Inc.
Performance Management Services, Inc.
Productos de Laboratorios, Ltda.
Quiroproductos de Cuauhtemoc, S.A. de C.V.
Timbre Hearing and Speech Centers, Inc.

TABLE OF CONTENTS

	PAGE
RULE 29.1 STATEMENT	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Cited PAGE

La Montagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984) 5

Lindsey v. Baxter Healthcare Corporation, 962 F.2d 586 (7th Cir. 1992) 1, 2, 3, 4

McDonnell-Douglas v. Green, 411 U.S. 792 (1973) 4, 5, 6, 7

Mechnig v. Sears Roebuck & Company, 864 F.2d 1359 (7th Cir. 1988) 6

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5

Statute Presented

Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* 2

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Baxter Healthcare Corporation respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported in *Lindsey v. Baxter Healthcare Corporation*, 962 F.2d 586 (7th Cir. 1992).

STATEMENT OF THE CASE

This is an employment discrimination case. Petitioner Steven Lindsey ("Lindsey") has sued his former employer Baxter Healthcare Corporation ("Baxter") alleging that Baxter passed him over for a promotion and later termi-

nated his employment because of his age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA"). In a pendent count, Lindsey also claims he did not receive severance pay due to him.

Lindsey was a Region Manager for Pharmaseal, a division of Baxter, for the Washington, D.C. region. Lindsey was a good Region Manager who achieved good sales results. However, his lack of sensitivity and failure to communicate clearly with supervisors "were themes running throughout his [performance] evaluations." (Dist. Ct. Dec., Pet. A. 14a; Ct. of App. Dec., Pet. A. 3a).[1] Additionally, Lindsey was criticized for calling a female Baxter Vice President a "bitch" in public, for leaking to others certain sensitive personnel information, and for becoming a subject of gossip about his alleged personal indiscretions. (Dist. Ct. Dec., Pet. A. 19a-21a; Ct. of App. Dec., Pet. A. 2a-3a).

In December 1986, Baxter created a new Operating Room Division ("ORD") by combining four divisions, one of which was Pharmaseal. The new ORD required, among other positions, nine Area Managers (Area Manager was one level above Region Manager).[2] Lindsey, who was age 40 at the time, expressed interest in one of the nine slots, the one in Washington, D.C. Baxter, however, chose another

[1] "Dist. Ct. Dec." refers to the District Courts' Decision of January 14, 1991. "Ct. of App. Dec." refers to the decision of the Court of Appeals for the Seventh Circuit of April 27, 1992. "Pet. A." refers to the Petitioner's Appendix.

[2] Lindsey claims in his Petition that "altogether eight new Area Managers were appointed as a part of the reorganization, none of whom was over 40." (Pet. 2) This is inaccurate. Nine Area Manager slots were filled, one by an individual over 40. (Dist. Ct. Dec., Pet. A. 26a).

Region Manager, age 32, for that position. In choosing among the many good Region Managers available, Baxter believed that Lindsey's deficiencies in professionalism, sensitivity and communication skills did not make him the best qualified candidate for the increased level of skill, responsibility and savvy required of Area Managers. (Dist. Ct. Dec., Pet. A. 19a; Ct. of App. Dec., Pet. A. 3a). In contrast, the person Baxter chose for the Washington, D.C. Area Manager position had an unblemished reputation as a strong leader who had never put himself or others in embarrassing positions. (Ct. of App. Dec., Pet. A. 3a).

While Lindsey was not selected to be one of the ORD's Area Managers, he was offered the position of Washington, D.C. Region Manager, at the same management level and compensation as his former position with Pharmaseal. Lindsey turned down the position, but Baxter allowed him to remain on the payroll for a short time while he looked for another position with Baxter. Having failed to find one, he was removed from the payroll on May 8, 1987.

On Baxter's motion for summary judgment, the District Court dismissed the age discrimination claim but awarded Lindsey $15,512.00 in severance pay even though Lindsey had not asked for judgment on that count. Both parties appealed. The Seventh Circuit affirmed the dismissal of the age discrimination claim. The court found that:

> In this age of sensitivity to the relations between the sexes in the workplace, one is hardly surprised that Lindsey should have been passed over for a promotion after calling a female superior a "bitch" and after his supervisors had received (according to an uncontested affidavit) "numerous reports of Lindsey's sexual indiscretions with colleagues, subordinates and even customers."

(Ct. of App. Dec., Pet A. 3a).

As to Lindsey's argument that his good performance evaluations warranted his promotion, the court found that:

> The fact that the decision [not to promote Lindsey] may have reflected a philosophy of personnel management with which the plaintiff's lawyer disagrees cuts no ice at all. There is nothing else in this case.

(*Id.*).

The Seventh Circuit also reversed and remanded for trial the judgment against Baxter on the severance pay claim, finding that:

> This seems to us as a classic case in which the meaning of the parties' contract does not appear with clarity on the face of a document but must be inferred from a sequence of documents illuminated by disputed evidence of practices and understandings. That is not a case which can be resolved on summary judgment.

(Ct. of App. Dec., Pet. A. 5a).

REASONS FOR DENYING THE WRIT

This is not a case where the decision of the court below conflicts with those of other Circuits or with a decision of this Court. Nor is it a case that raises issues that are so "special and important" as to warrant review by this Court. Sup. Ct. R. 10. Rather, this is a simple, routine discrimination case which turns on its own facts, and affects no one other than the litigants.

Yet, in an effort to characterize this case as presenting issues of general importance, Lindsey has asked this Court to "reconsider the burden of proof standard articulated in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973)." (Pet. 5). Lindsey, however, presents no reasons for doing so other than (1) that devious and sophisticated human resource departments allegedly can now mask their dis-

crimination by means that are "more subtle and difficult to ascertain" (Pet. 3) and (2) that Lindsey's own case did not survive summary judgment. Neither reason suggests that the *McDonnell-Douglas* standard needs to be overhauled.

Contrary to Lindsey's argument, the *McDonnell-Douglas* standard is not a tool of the defendant employer in discrimination cases; rather, it provides for an indirect method of proof that makes it substantially *easier* for *plaintiffs* like Lindsey to survive summary judgment and have their cases heard before a jury. "The special virtue of the indirect method of proof is that it allows victims of age discrimination to prevail without presenting *any* evidence that age was a determining factor in the employer's motivation." *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984). It "compensates for [the plaintiff's] evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation." *Id.* Thus, this Court has concluded that "we remain confident that the *McDonnell-Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981).

Nothing raised in Lindsey's Petition should shake that confidence. Lindsey argues, as he did in the courts below, that his good performance evaluations "entitled" him to a promotion and raise an inference that the Company's reason for not promoting him was because of his age. But both courts below found that Lindsey's argument boiled down to nothing more than his quarrel with Baxter's business judgment in assigning greater weight to factors other than the evaluations—such as professionalism, communication skills and sensitivity—in promoting persons to Area

Manager. The courts below found that nothing in the ADEA impinged on Baxter's prerogative to choose those criteria. Their analysis is supported by decisions throughout the circuits, and does not suggest a need to reconsider *McDonnell-Douglas*. *See, e.g., Mechnig v. Sears Roebuck & Company*, 864 F.2d 1359, 1365 (7th Cir. 1988).

Nor does Lindsey's second contention, that Baxter's case on summary judgment was, in part, based on the affidavits of the decisionmakers involved, suggest that *McDonnell-Douglas* should be revisited. Lindsey, like all plaintiffs, had the opportunity to cross-examine the decisionmakers by taking their depositions. Instead, he chose to submit his *own* affidavit, wherein he merely disagreed with the decisionmakers' judgments of his qualifications for promotion to Area Manager. That was Lindsey's "evidence." He failed to proffer any proof that the decisionmakers' judgments were not genuinely held or in any way influenced by his age. Both courts below found Lindsey's own self-interested opinions to be insufficient to raise a genuine issue of fact that Baxter's treatment of Lindsey was because of his age. Those concurrent holdings do not suggest that *McDonnell-Douglas* is faulty, only that Lindsey's evidence is.

Finally, Lindsey argues, as a second reason for review, that the lower court failed to correctly apply the standard for summary judgment under Fed.R.Civ.P. 56. This is precisely the type of routine mixed issue of fact and law that this Court has historically avoided reviewing. Both lower courts found that Lindsey had failed to raise a *material* issue of fact. Lindsey makes no showing that these courts erred at all, let alone the very obvious and exceptional showing of error warranting review by this Court.

The fact that Lindsey was unable to meet the *McDonnell-Douglas* standard is no reason to change it. In short, this Petition is nothing more than "sour grapes" by a plaintiff who did not have the evidence necessary to survive summary judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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